No. 95-5661

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

JUAN MELENDEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership consists of more than 8,000 lawyers and more than 28,000 affiliate members, including citizens of every state. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates.

The NACDL is dedicated to the preservation and improvement of our adversary system of justice. Among the NACDL's stated objectives are the promotion of the proper administration of criminal justice, the protection of individual rights, and the

improvement of the criminal law, its practices, and its procedures.

The NACDL has appeared as amicus curiae in many cases addressing issues arising out of the federal sentencing scheme. It believes that the issue presented here is of great significance to the criminal justice system because the decision below improperly confers upon prosecutors excessive authority to limit a court's discretion in sentencing defendants who may be entitled to a reduced sentence because they have provided substantial assistance to an investigation. NACDL believes that the Court will benefit from its views on this important issue.

Both petitioner and respondent have consented to the filing of this brief, and letters reflecting those consents have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

A. Congress directed the Sentencing Commission in 28 U.S.C. § 994(n) to take account in its guidelines of the appropriateness of reducing otherwise applicable minimum sentences to reflect a defendant's substantial assistance in the investigation of another person. The Commission implemented this directive in section 5K1.1 by making a substantive determination to allow departures from *guideline* minimum sentences according to the same standard set forth in 18 U.S.C. § 3553(e) for departures from *statutory* minimum sentences.

The effect of the Commission's determination was to unify the treatment of departures from both statutory and guideline minimum sentences under the umbrella of section 5K1.1. When the government files a motion certifying that the defendant has provided substantial assistance, it has met the substantive standard authorizing departure from both kinds of minimums. In that situation, it is both illogical and inconsistent with the Commission's substantive judgment to permit departures from only one kind of minimum sentence but not the other. There is no justification in the text of the relevant statutory and guideline provisions for the court of appeals' contrary holding that there exist distinct procedural tracks for substantial assistance departures from each kind of minimum sentence, thereby allowing the prosecutor to prevent the district court from departing from a statutory minimum even as the government files a motion certifying to the defendant's substantial assistance.

B. Congress did not design section 3553(e) as a stand-alone provision that would govern substantial assistance departures from statutory minimum sentences, without regard to the general framework established by the Sentencing Commission. Section 3553(e) expressly provides that sentences departing from statutory minimums "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission." And 28 U.S.C. § 994(n), which was enacted contemporaneously with section 3553(e), directs the Sentencing Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence . . . than that established by statute as a minimum sentence." Thus, it was clearly within the Sentencing Commission's power to create a system in which a government substantial assistance motion authorizes departures from both kinds of minimum sentences. The only question presented here is whether the Commission did so or whether instead it determined to exclude departures from statutory minimums from the guidelines framework.

C. The relevant materials leave no doubt that the Commission intended that section 5K1.1 would serve as the framework for departures from both kinds of minimum sentences. The Commission's own commentary, which is "authoritative" (*Stinson v. United States*, 113 S. Ct. 1913, 1915 (1993)) and the "legal equivalent of a policy statement" (USSG § 1B1.7), makes that clear. Application Note 1 to section 5K1.1 itself refers to statutory minimums and would be meaningless if that section had no application to such minimums; moreover, the Commission elsewhere refers to section 5K1.1 as the source of authority for departures from statutory minimums. USSG § 2D1.1, Application Note 7.

Even apart from the commentary, it is irrational to construe the Commission's actions as leaving outside the guidelines an

independent procedural route for departures from statutory minimums. In addition to being needlessly duplicative, that approach would flout Congress's specific directive in section 994(n) that the *guidelines* should "reflect the general appropriateness of imposing . . . a sentence that is lower than that established by statute as a minimum sentence" when a defendant substantially assists in an investigation.

Contrary to the court of appeals' finding, it is inconceivable that the Commission made a deliberate "policy decision" (Pet. App. 8) to preserve two different procedural tracks because it wanted to give prosecutors the power to control the scope of the court's authority to depart from minimum sentences. The rule set forth in section 5K1.1 for determining the "appropriate reduction," once the government has filed a substantial assistance motion, demonstrates that the Commission had the opposite view. That rule accords maximum discretion to the district court to determine the reduced sentence — with no constraints imposed by the Commission and with the government's role explicitly limited to an advisory one in providing its evaluation of the level of assistance rendered. If the Commission had wanted to give the prosecutor some control over the extent of the reduction, section 994(n) gave it leeway to do so in a more direct and sensible fashion than the crude and haphazard mechanism of denying any authority to depart from one kind of minimum sentence. Thus, it is apparent that the Commission did not intend to give the prosecutor this power.

The decision below is not supported by the text of section 5K1.1. Although the first sentence of the policy statement uses the term "guidelines" without expressly referring to statutory minimums, that is understandable because the substantive policy judgment contained there was novel only for guideline sentences; the Commission was not altering the substantive standard for statutory minimums already found in section 3553(e). In any event, the term "guideline" is commonly read broadly to encompass statutory minimums as well. Otherwise, statutory minimums would be excluded from the scope of certain provisions that are plainly designed for universal application, such as the appropriate reduction factors in section 5K1.1 and the section 3553(c) requirement of a statement of reasons for sentencing below the minimum.

ARGUMENT

A GOVERNMENT MOTION FOR REDUCTION OF SENTENCE BASED UPON THE DEFENDANT'S SUBSTANTIAL ASSISTANCE IN A CRIMINAL INVESTIGATION AUTHORIZES THE SENTENCING COURT TO DEPART FROM BOTH THE SENTENCING GUIDELINES AND AN OTHERWISE APPLICABLE STATUTORY MINIMUM SENTENCE

A. Background

Congress fundamentally changed the federal sentencing system with the enactment of the Sentencing Reform Act of 1984. The new law established the Sentencing Commission to place limits on the district court's broad sentencing authority by developing a system of sentencing ranges keyed to individual conduct. The duties of the Commission were set forth in 28 U.S.C. § 994 and included the promulgation of both sentencing "guidelines" for district courts to follow in imposing individual sentences and "policy statements regarding application of the guidelines or any other aspect of sentencing." *Id.* § 994(a)(1), (2). These guidelines and policy statements are "binding on federal courts." *Stinson v. United States*, 113 S. Ct. 1913, 1917 (1993). The Act also set forth rules governing the district court's role in sentencing in 18 U.S.C. § 3553, including the requirements that all sentences adhere "to the sentencing range . . . set forth in the guidelines" unless there exist aggravating or mitigating circumstances not considered by the Commission in establishing those guidelines and that the district court provide a statement of reasons for imposing a particular sentence. *Id.* § 3553(b), (c). The effective date of section 3553 was postponed for three years, allowing time for the Commission to promulgate sentencing guidelines. *See* Pub. L. No. 98-473, § 235(a)(1), 98 Stat. 2031 (1984), as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728 (1985).

In 1986, Congress amended these complementary sections to permit and encourage the imposition of a lower sentence when a defendant assists the government in investigating or prosecuting other persons. In section 994(n), Congress directed the Commission to take responsibility for establishing a general framework for accomplishing that objective. That statute provides:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Congress similarly amended the rules directly applicable to district courts by adding section 3553(e), which provides:

> *Limited authority to impose a sentence below a statutory minimum*. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

These two sections are closely related in several ways: they both incorporate the same standard for sentence reduction — namely, "a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense"; they both specifically authorize the reduction of statutory minimum sentences in that event; and they both explicitly contemplate that the district court will be bound by the guidelines in imposing such a reduced sentence. The difference is

that section 3553(e) limits a court's ability to depart from statutory minimum sentences, and hence the Sentencing Commission's discretion to permit such departures, by specifying that the court's authority must be triggered by a "motion of the Government." By contrast, section 994(n) allows the Commission to authorize departures from the guidelines even in the absence of a government motion.

The Commission implemented the directive of section 994(n) by issuing Policy Statement 5K1.1. Rather than differentiate between the two kinds of minimum sentences, the Commission decided to extend to departures from guideline ranges the government motion requirement contained in section 3553(e). The first sentence of the policy statement describes the departure rule for guideline ranges in language almost identical to that used in section 3553(e) for statutory minimum sentences: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." USSG § 5K1.1.[1] The Commission's policy statement then proceeds to list various factors to guide the district court in determining what is an appropriate sentencing reduction in a particular case, including "the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." USSG § 5K1.1(a)(1). Neither section 5K1.1 nor section 3553(e) purports to describe any particular procedure to be followed by the government in filing a substantial assistance motion.

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[1] The policy statement was first issued in 1987 and was amended to its current form in 1989 "to clarify the Commission's intent that departures . . . be based upon the provision of substantial assistance," rather than merely "a willingness to provide such assistance." United States Sentencing Commission, *Guidelines Manual*, Appendix C, Amendment 290 (1994).

B. The Sentencing Commission Is Empowered to Authorize Courts to Impose Sentences Below the Statutory Minimum When the Government Files a Motion Attesting That the Defendant Rendered Substantial Assistance in the Investigation of Another Person

The court of appeals ruled that these closely related provisions should be construed as establishing two completely distinct tracks for authorizing courts to impose reduced sentences because of substantial assistance. According to the court below, a district court can impose a sentence lower than the statutory minimum only if the government has filed a motion under section 3553(e) requesting a departure from the statutory minimum; by the same token, a court presumably can invoke substantial assistance to impose a sentence below the bottom of the guideline range only if the government files a motion under section 5K1.1 explicitly requesting a departure from the guidelines on that basis. Pet. App. 10. Thus, the court held that only if the government files two separate motions attesting to substantial assistance (or, perhaps, a single motion explicitly requesting departure from both the guideline and statutory minimum sentences) is the district court authorized to depart from minimum sentence constraints and determine the "appropriate reduction" as directed by section 5K1.1(a).

The court's restrictive reading of the circumstances that permit sentence reductions for substantial assistance is not based on a perceived statutory prohibition or a determination of Congressional intent. That is, the court of appeals did not suggest that section 3553(e) imposes a procedural requirement of a government motion *under that section* that overrides any action taken by the Commission. To the contrary, the court below expressly accepted arguendo petitioner's contention that "Congress in § 994(n) authorized the Commission to take back the access key granted to the prosecutor in § 3553(e)." Pet. App. 8. The only other court of appeals to agree with the decision below similarly has acknowledged that "[t]he statutes plainly empower the Sentencing Commission to provide for departures below the

statutory minimum." *United States v. Rodriguez-Morales*, 958 F.2d 1441, 1444 (8th Cir.), *cert. denied*, 113 S. Ct. 375 (1992).

Indeed, the government does not dispute this point. In its brief in opposition (at 6), the government recognizes that the Sentencing Commission has the power to resolve the question presented here in favor of either party, noting that the "Commission has authority to promulgate guidelines that address the proper response by a court when the government moves for departure below an applicable sentence based on substantial assistance." As the government explains, the relevant statutes show that the Commission's authority extends to cases where the applicable sentence is a statutory minimum. In particular, section 994(n) specifically directs the Commission to "assure the general appropriateness of imposing . . . a sentence that is lower than that established by statute as a minimum sentence."

Moreover, the interrelationship of those statutes makes clear that Congress did not design section 3553(e) to stand alone as a provision that provides an independent track for allowing departures from minimum sentences without regard to the framework set up by the Commission. Section 3553(e) was enacted contemporaneously with section 994(n) — indeed, side-by-side in the same statute. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1007, 1008, 100 Stat. 3207, 3207-7 to 3207-8 (1986). Thus, the statement in section 3553(e) that reduced sentences under that section must be "imposed in accordance with the guidelines and policy statements" was made in conjunction with Congress's directive to the Commission in section 994(n) to provide in the guidelines for reductions of statutory minimum sentences based on substantial assistance. As its title reflects, section 3553(e) was enacted as a limitation on the court's ability to reduce a statutory minimum sentence, not as a procedural mechanism governing such a reduction that would inevitably operate independent of the Sentencing Guidelines. *See United States v. Beckett*, 996 F.2d 70, 75 (5th Cir. 1993) (nothing in the relevant statutes suggests "that Congress intended to permit the government to limit the scope of the court's sentencing authority by choosing to

package its substantial assistance representation in a 5K1.1 motion rather than a 3553(e) motion").

Thus, it is undisputed that the outcome of this case turns on what the *Sentencing Commission* did in implementing the Congressional directive contained in section 994(n). The court of appeals below ruled for the government because it held that section 5K1.1 "represent[s] an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by § 3553(e)." Pet. App. 8. The court thus concluded that the Commission deliberately established a system requiring separate motions for departures from applicable guideline and statutory minimum sentences, respectively. This conclusion is erroneous. As most courts of appeals to consider this issue have correctly held, nothing in the text of the Commission's pronouncements compels that conclusion, and all available evidence indicates that the Commission did *not* intend to establish such a redundant procedure.

C. The Sentencing Commission's Implementation of Congress's Directive to Take Account of a Defendant's Substantial Assistance Established a Framework Under Which a Government Motion Attesting to Such Assistance Authorizes the Court to Depart from Both the Sentencing Guidelines and an Otherwise Applicable Statutory Minimum Sentence

In section 994(n), Congress directed the Sentencing Commission to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence." In so doing, it gave the Commission the leeway to differentiate between the two types of applicable minimums — guideline and statutory minimums. Section 3553(e) limited the Commission's discretion in the case of statutory minimums by providing that a court can depart from them only upon motion of the government reflecting the defendant's "substantial assistance," while section 994(n)

contained no similar limitation and thus did not restrict the Commission in that manner in dealing with departures from guideline minimums.

The Commission, however, made an "advertent decision" (*cf.* Pet. App. 8) not to differentiate between statutory minimums and guideline minimums with respect to the circumstances under which departures based on substantial assistance would be permitted. Section 5K1.1 provides that the district court's authority to depart from a guideline minimum is triggered by the same prerequisite contained in section 3553(e) for statutory minimums — namely, a government motion attesting to the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." Thus, in establishing a guidelines framework that would "reflect the appropriateness of" imposing lower sentences when a defendant has rendered substantial assistance, the Commission decided to *unify* the treatment of statutory and guideline minimums.

Section 5K1.1 therefore is most logically viewed as applying comprehensively to all substantial assistance departures. Four of the five circuits that previously considered the issue presented here have so concluded, ruling that section 5K1.1 encompasses substantial assistance departures from statutory minimums. *United States v. Wills*, 35 F.3d 1192 (7th Cir. 1994); *United States v. Beckett*, 996 F.2d 70 (5th Cir. 1993); *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991); *see also Wade v. United States*, 936 F.2d 169, 171 (4th Cir. 1991) (dicta), *aff'd on another issue*, 504 U.S. 181 (1992); *but see United States v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir.), *cert. denied*, 113 S. Ct. 375 (1992). For the reasons explained in more detail below, this Court should similarly conclude that the Commission established a framework under which a government substantial assistance motion authorizes the district court to depart from both kinds of minimum sentences.

1. The Commission's Own Explanatory Commentary Demonstrates that in Section 5K1.1 the Commission Intended to Establish Identical and Unified Treatment of Substantial Assistance Departures from Both Kinds of Minimum Sentences

It is beyond dispute that the Commission intended that departures from both kinds of minimum sentences would be governed under the umbrella of the guidelines and that the Commission believed it had accomplished that goal in section 5K1.1. The commentary to section 5K1.1 explicitly refers to section 3553(e) and explains the policy statement as describing a rule that governs both kinds of minimum sentences:

> Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

USSG § 5K1.1, Application Note 1.

This application note reflects the Commission's view that section 5K1.1 implements both of the referenced statutes by using the same standard as a prerequisite for a court to depart from both kinds of minimum sentences — namely, a government motion attesting to substantial assistance. As Judge Heaney stated in rejecting the position adopted by the court below, "the commentary informs courts that a 5K1.1 motion for substantial assistance permits a court to depart below the mandatory minimum sentence"; otherwise, it would serve no purpose. *Rodriguez-Morales*, 958 F.2d at 1448 (Heaney, J., dissenting). It shows that "the Sentencing Commission intended that § 5K1.1 serve as a conduit for the application of § 3553(e)." *Cheng Ah-Kai*, 951 F.2d at 493; *see also Wills*, 35 F.3d at 1196; *Beckett*, 996 F.2d at 74, 75 (section 5K1.1 is the appropriate "vehicle" or "tool by which § 3553(e) may be implemented"); *Keene*, 933 F.2d at 714-15.

The Commission's understanding that it unified treatment of both kinds of minimum sentences when it promulgated section 5K1.1 is also reflected elsewhere in the guidelines. Section 2D1.1 is a lengthy guideline addressed to a variety of drug offenses, which are the crimes to which most statutory minimums attach. *See Rodriguez-Morales*, 958 F.2d at 1449 (Heaney, J., dissenting). The commentary to that guideline states as follows:

> Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived" and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. § 994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* § 5K1.1 (Substantial Assistance to Authorities).

USSG § 2D1.1, Application Note 7. Thus, the Commission in its commentary has repeatedly listed section 5K1.1 as the authority for a court's ability to depart below a statutory minimum sentence. *See Cheng Ah-Kai*, 951 F.2d at 493; *Rodriguez-Morales*, 958 F.2d at 1449 (Heaney, J., dissenting).

These commentaries are prepared by the Commission itself and therefore are entitled to great weight in interpreting the Commission's policy statements and guidelines. As this Court observed in *Stinson*, 113 S. Ct. at 1918, the "commentary explains the guidelines and provides concrete guidance as to how [they] are to be applied in practice." Thus, the Eighth Circuit erred in dismissing the commentary (pre-*Stinson*) as merely "an academic observation" that provides no guidance in interpreting section 5K1.1. *See Rodriguez-Morales*, 958 F.2d at 1444. The guidelines themselves provide that commentary addressing the appropriate circumstances for departing from the guidelines "is to be treated as the legal equivalent of a policy statement." USSG § 1B1.7. And this Court has held that "commentary in the Guidelines Manual that interprets or explains a

guideline is authoritative" unless it is a "plainly erroneous reading" of the guideline or it contradicts a higher authority, such as a statute or the Constitution. *Stinson*, 113 S. Ct. at 1915.

Accordingly, it is untenable for the court of appeals to conclude that the Commission made an "advertent decision" to "leav[e] departures below statutory minima to the authority conferred by § 3553(e)" and "to provide authority in the Guidelines only for departures below the Guideline range." Pet. App. 8. To the contrary, the Commission's own words reveal its intent that all departures based on substantial assistance should fall under the umbrella of the guidelines, and it did not preserve section 3553(e) as an independent, unrelated avenue for departures in the case of statutory minimums.

2. It Is Illogical to Construe the Commission's Promulgation of Section 5K1.1 As Limited to Guideline Ranges While Requiring a Distinct Procedural Avenue for Authorizing Departures from Statutory Minimums

Once the Commission determined to establish the same prerequisite for departures from guideline minimums as that contained in section 3553(e) for statutory minimums, it would have been illogical for the Commission to insist on different procedural avenues for each kind of departure. From an administrative standpoint, such an approach would have been burdensome and pointless since the two motions would be duplicative, consisting of the same attestation from the prosecutor concerning the defendant's substantial assistance.

Moreover, that approach would work at cross purposes with the substantive judgment the Commission made in promulgating section 5K1.1. The Commission decided that, in the substantial assistance context, it would obliterate any distinction between guideline and statutory minimums and establish a rule that would allow departures from guideline minimums in the same circumstances in which Congress had already allowed departures from statutory minimums. That substantive decision to have a single standard for departing from both kinds of

minimums would be undermined by a procedure that opens the door to differential treatment — allowing departures from one kind of minimum sentence when the common standard is satisfied but prohibiting departure from the second kind of minimum sentence.

Contrary to the suggestion of the court below, a system that treats the filing of a single substantial assistance motion as authorizing departures from both kinds of minimum sentences does not take away the "access key" granted to the prosecutor in section 3553(e). *See* Pet. App. 8. The prosecutor still retains the sole power to decide when a defendant's assistance crosses the threshold that warrants a sentence reduction, and the government can prevent any departure from a minimum sentence simply by refusing to file a motion attesting to such substantial assistance. *See Wade v. United States*, 504 U.S. 181, 185 (1992). All the Commission has done is broaden the domain controlled by the prosecutor's "access key." When the government files a motion certifying the defendant's substantial assistance, the Commission has determined that departures will be allowed from guideline minimums as well as from statutory minimums.

Indeed, for the Commission deliberately to create a two motion system by declining to cover departures from statutory minimums would have been unfaithful to the charge given to it by Congress in section 994(n). That statute expressly ordered the Commission to assure that the guidelines "reflect the general appropriateness of imposing . . . a sentence that is lower than that established by statute as a minimum sentence" when a defendant substantially assists in an investigation. *See also Rodriguez-Morales*, 958 F.2d at 1444 & n.2 (acknowledging that section 994(n) not only "plainly empower[s] the Sentencing Commission to provide for departures below the statutory minimum" but also "can be read as mandating" that the Commission so provide); *Wills*, 35 F.3d at 1195. Under the holding of the court below, the Commission flouted this express directive by deliberately excluding from the guidelines any mechanism for

taking substantial assistance into account in departing from minimum sentences.

The facts of this case illustrate how the court's decision undermines section 994(n). It is undisputed that the defendant satisfied the standard set forth by Congress for a reduction from the statutory minimum; the prosecutor filed a motion attesting that the defendant provided "substantial assistance in the investigation or prosecution of another person." Pet. App. 3. In those circumstances, section 994(n) demands that the Commission establish guidelines that will allow a reduction below a statutory minimum sentence. Yet according to the court of appeals the Commission has failed to accommodate that demand, and the district court is bound by that statutory minimum despite the government's certification that the defendant provided substantial assistance.

There is no basis for assuming that the Commission had any interest in disregarding the mandate of section 994(n) or in failing to perform the tasks set forth there. The decision of the court below thus turns ordinary principles of interpretation on their head in construing the Commission's actions in a way that would reflect an intent not to comply with Congress's directive in full. *Cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (agency's "decision is entitled to a presumption of regularity"). Especially in light of the guideline commentary, the court below should more properly have assumed that the Commission sought fully to implement section 994(n), and the court should have interpreted the Commission's actions in accordance with that intent.

3. The Commission Did Not Intend to Confer Upon Prosecutors the Power to Restrict the District Court's Authority to Depart from Otherwise Applicable Minimum Sentences When a Defendant Has Rendered Substantial Assistance

There is only one conceivable reason why the Sentencing Commission might have established a duplicative procedure requiring separate substantial assistance motions for guideline minimums and statutory minimums — that is, if the Commission deliberately decided that it wanted a prosecutor to be able to exercise control over the ultimate sentence by having the option of authorizing a departure from one kind of minimum sentence but not from the other kind of minimum sentence. The court below found that the Commission consciously made that precise judgment, ruling that "§ 5K1.1 reflects a policy decision on the part of the Commission to give the prosecutor a veto power over departures below the Guidelines range based on cooperation." Pet. App. 8. The court cited no authority to justify its finding regarding the Commission's intent, and there is not a shred of evidence to support it. To the contrary, the Commission's statements on the subject of substantial assistance departures strongly indicate that it would not regard conferring this power on prosecutors to be desirable policy.

Section 994(n) gave the Commission broad discretion to delineate the extent to which departures for substantial assistance would be allowed. The Commission could have determined, for example, that substantial assistance motions could yield up to a 50 percent reduction from the otherwise applicable minimum or it could have established new guideline ranges for cooperating defendants — ones that would control departures from both guideline minimums and statutory minimums. And, presumably, the Commission could have given prosecutors some binding authority to limit the permissible degree of departure.

The Commission, however, chose not to impose these kinds of limitations, instead leaving the extent of departure almost entirely to the sound discretion of the district court. Section 5K1.1(a) does provide guidance to the court, containing a non-exclusive list of factors that the court may consider in determining the appropriate reduction. The prosecutor is mentioned in those factors but his role is strictly advisory — one of the factors is "the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered." USSG § 5K1.1(a)(1). The commentary on this portion of the policy statement reemphasizes the court's superior responsibility. The nature and extent of the defendant's assistance "must be evaluated *by the court* on an individual basis," but "[s]ubstantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain." *Id.*, Background Commentary and Application Note 3 (emphasis added).

The Commission's decision to grant the district court authority to determine the appropriate sentence reduction accords with the traditional role of the court in the sentencing process. Although all three branches have always played some role in the process that ultimately results in a sentence, the judiciary traditionally has "exclusively" performed the task of "passing sentence on every criminal defendant." *Mistretta v. United States*, 488 U.S. 361, 407-08 (1989). The Sentencing Reform Act imposed some new constraints on the range of the district court's authority, but it did not change the court's ultimate role as the arbiter of the individual sentence.

Moreover, even those additional constraints flow entirely from authority granted by Congress to the Sentencing Commission, not to prosecutors. Here, where the Sentencing Commission decided to forgo the opportunity to issue its own guidelines for reduced sentences, it follows *a fortiori* that it did not intend to give the *prosecutor* the power to exercise control over the appropriate level of reduction. Rather, as the policy statement

expressly states, that is a matter to be "determined by the court." USSG § 5K1.1(a).

Finally, if the Commission had wanted to give the prosecutor some control over the amount of sentence reduction, there is no reason why it should have limited itself to the elliptical method found by the court of appeals. Section 994(n) gave the Commission broad authority "to reflect the general appropriateness" of imposing reduced sentences when the defendant has rendered substantial assistance. Presumably, the Commission could have issued guidelines that gave the prosecutor more input into sentencing, even requiring the court to limit sentence reduction to the amount recommended by the prosecutor. Plainly, the Commission believed that it was inappropriate to give the prosecutor such a direct role, and that is why it limited the government's role to providing an evaluation of the level of assistance for the court to consider. USSG § 5K1.1(a)(1).

Against this background, it is inconceivable that the Commission made a "policy decision" (Pet. App. 8) to give the prosecutor *one* element of control over the amount of sentence reduction in cases of substantial assistance by permitting the prosecutor to authorize the court to reduce a sentence below the guideline minimum while prohibiting the court from going below the statutory minimum. In terms of achieving the supposed policy goal identified by the court of appeals, this element of control is so crude as to be almost worthless. The prosecutor cannot reliably use this tool "'to offer a reward for assistance'" that is "'graduated to the value of the assistance.'" Pet. App. 9, quoting *Wills*, 35 F.3d at 1198 (Easterbrook, J., dissenting). The amount of the "reward" is not within the prosecutor's control; it is a wildly fluctuating number that depends on the haphazard relationship between the statutory minimum and the guideline sentence in a particular case. For example, in this case the guideline minimum was 135 months and the statutory minimum was 120 months, allowing the prosecutor the opportunity to offer as a "reward" exactly a 15-month reduction. *See* Pet. App. 3. By contrast, in the *Keene* case, the only option for the "reward" was a 68-month reduction, even though the assistance

rendered in *Keene* might have been less valuable than that rendered in this case. *See* 933 F.2d at 712.

In sum, it is untenable for several reasons to conclude that the Commission deliberately made a policy decision to require two separate motions as a way of giving the prosecutor control over the extent to which the district court can depart from a minimum sentence because of substantial assistance. The prosecutor has the authority to decide whether to make a substantial assistance motion and to recommend the amount of departure, but "[o]nce that recommendation is made, . . . the extent of [the] departure is discretionary" with the district court. *Wills*, 35 F.3d at 1196-97; *see also Cheng Ah-Kai*, 951 F.2d at 494; *Keene*, 933 F.2d at 714.

4. The Text of Section 5K1.1 Does Not Compel the Conclusion That the Commission Preserved a Separate Avenue for Seeking Reductions of Statutory Minimum Sentences Under Section 3553(e)

Although it reached the same result as the court of appeals below, the Eighth Circuit did not find that the Commission deliberately decided to give prosecutors the option of permitting departures from only one kind of minimum sentence when a defendant has rendered substantial assistance. To the contrary, the Eighth Circuit recognized that it would have been problematic for the Commission to reach such a policy decision in light of Congress's instructions in section 994(n). *See Rodriguez-Morales*, 958 F.2d at 1444 n.2. The Eighth Circuit, however, ruled that the Commission's intent is irrelevant because the text of section 5K1.1 refers only to "guidelines," not statutory minimum sentences. According to the court, "[w]hether the Commission intended to give the prosecution two alternative motions for substantial assistance departures — thus allowing the government to set the parameters of the district court's discretion — section 5K1.1 as drafted has created such a result," leaving the court "no choice but to hold" that "[o]nly a section 3553(e)

motion allows for" departure from a minimum sentence. *Id.* at 1445.

The Eighth Circuit's rationale is as flawed as that of the court below. At the outset, we note that section 5K1.1 is a policy statement, and the Commission's own guidelines establish that commentary concerning departures "is to be treated as the legal equivalent of a policy statement." USSG § 1B1.7. Therefore, the text of section 5K1.1 carries no greater weight than the text of the supporting commentary. Even if the text of the policy statement standing alone did support the decision below, it could not override the Commission's clear message in the relevant commentary that it included statutory minimums under the umbrella of the guidelines.

More generally, the Eighth Circuit is incorrect in concluding that the text of section 5K1.1 standing alone compels acceptance of the government's position. In fact, that text is fully consistent with the proposition that a district court is authorized to depart from both kinds of minimum sentences when the government files a substantial assistance motion. Accordingly, this Court should construe the applicable provisions in accordance with the Commission's manifest intent and should reject the contention that the guidelines make no provision for reduction of statutory minimum sentences where the defendant provides substantial assistance.

a. The courts that have agreed with the government's position have laid undue stress on the use in the first sentence of section 5K1.1 of the term "guidelines." *See* Pet. App. 8; *Rodriguez-Morales*, 958 F.2d at 1444. Even assuming that this term should be read narrowly to exclude statutory minimum sentences, its use is not probative of the issue before this Court. The first sentence of section 5K1.1 is the Commission's substantive policy statement of how it decided to implement Congress's instructions in section 994(n) to allow downward departures from minimum sentences to "take into account a defendant's substantial assistance." In the case of guideline minimums, there was no standard for taking substantial assis-

tance into account until the promulgation of section 5K1.1, and therefore it was necessary for the Commission to address guideline minimums in that sentence.

In the case of statutory minimums, however, section 3553(e) already established the standard adopted by the Commission in the first sentence of section 5K1.1, that is, authorizing departures if the government files a substantial assistance motion. If the Commission had decided to make a rule for statutory minimums that supplemented or differed from the section 3553(e) rule, then it would have been important for the Commission to make clear with an explicit reference that the new rule applied to statutory minimum sentences. But, given the decision the Commission actually made, an explicit reference would have been largely superfluous. If one were to add the phrase "or a statutory minimum sentence" after "guidelines" in section 5K1.1, that amendment would not convey any new information and would not change the substantive rule for departures based on substantial assistance. Therefore, the omission of that phrase should not be accorded great significance.

Clearly, the Commission's failure to include that phrase should not be probative of the issue before this Court, which concerns the *procedure* for authorizing a district court to depart from an otherwise applicable minimum sentence. Neither section 3553(e) nor the first sentence of section 5K1.1 purports to detail a procedure for substantial assistance departures. All they do is establish the substantive requirement that the government file a motion. Where, as here, the government does file a motion attesting to the defendant's substantial assistance, the substantive requirement of both sections is satisfied, and it is fully consistent with the language of both sections for that single motion to authorize departure from both kinds of minimum sentences.

b. In any event, even assuming that for some reason it is necessary that the first sentence of section 5K1.1 encompass statutory minimums, that requirement is met here because the term "guidelines" is frequently given a broad meaning that

encompasses statutory minimums. For most purposes, guideline minimums and statutory minimums are close cousins; there is no sharp distinction between the two. For example, section 5G1.1(b) of the guidelines provides that when the statutory minimum is above the guideline range, "the statutorily required minimum sentence shall be the guideline sentence."[2]

Congress itself has used the term "guidelines" in this broad sense. The original version of section 3553, before the 1986 addition of section 3553(e), made no reference at all to statutory minimums, even though the federal criminal statutes contained minimum sentence provisions. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. 66 (1984). In listing the factors the district court must consider, the statute refers only to "the sentencing range . . . set forth in the guidelines." 18 U.S.C. § 3553(a)(4). Thus, under the court of appeals' view that "guidelines" and statutory minimums are mutually exclusive, the original section 3553 would not have directed district courts to take account of statutory minimums when sentencing.

A narrow reading of "guidelines" would also lead to similar anomalies and gaps today. If section 5K1.1 does not encompass minimum sentences, then a district court is bound to consider the long list of factors set forth there only when it is departing from the guidelines, but not when it is departing from a statutory minimum. More important, Section 3553(c)(2) requires a court to provide "the specific reason for the imposition of a sentence"

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[2] Indeed, the court of appeals below stated that, in such circumstances, a section 5K1.1 motion does authorize the court to depart from a statutory minimum because a "motion under either § 3553(e) or § 5K1.1 will suffice to demonstrate that the requisite exercise of prosecutorial discretion has occurred." Pet. App. 8 n.1. That concession recognizes that there is nothing talismanic about the form of a government substantial assistance motion; whatever its form, the substance of the motion is a statement by the government that the standard for departing from either kind of minimum sentence has been satisfied. The court's statement is logically incompatible with its position that section 5K1.1 cannot provide authority for departing from a statutory minimum.

outside the guideline range. If "guidelines" do not encompass statutory minimums, that requirement would apply only to substantial assistance departures below the guidelines, but the court would have no obligation to provide a reason for imposing a particular sentence below a statutory minimum. In both of these situations, applying the court of appeals' cramped reading of guidelines would create gaps in the new system of district court accountability for sentencing that clearly were not intended by Congress or the Commission.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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